

**A Tanah Sutera Development Sdn Bhd v
Pentadbir Tanah Daerah Johor Bahru**

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO J-01-44 OF
1997

B GOPAL SRI RAM, ABDUL KADIR SULAIMAN AND KC VOHRAH JJCA
15 JANUARY 2002

Civil Procedure — *Transfer of action* — *From Court of Appeal to Federal Court* — *Court of Appeal had no jurisdiction to hear case* — *Whether Court of Appeal had jurisdiction to effect transfer* — *Inherent jurisdiction of Court of Appeal* — *Whether interest of justice in favour of effecting transfer* — *Courts of Judicature Act 1964 Sch para 12* — *Interpretation Acts 1948 and 1967 s 17A* — *Rules of the Court of Appeal 1994 r 76* — *Rules of the High Court 1980 O 92 r 4*

Words and Phrases — ‘any other court’ — *Courts of Judicature Act 1964 Sch para 12*

D The respondent in the present case had taken an objection on the ground that this court had no jurisdiction to transfer the appellant’s appeal to the Federal Court. It was contended that since the Court of Appeal had no jurisdiction to hear the appeal, it followed that it had no jurisdiction to make the order of transfer.

E Held:

F (1) Where the Court of Appeal had no jurisdiction to hear an appeal (*Batu Kawan Bhd v Pentadbir Tanah Daerah Seberang Perai Selatan* [1998] 3 MLJ 205), it did not mean that it had no jurisdiction to transfer the case to the Federal Court. The phrase ‘any other court’ in para 12 of the Schedule to the Courts of Judicature Act 1964 must be read generously and purposively; *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 followed. Indeed, that was the will of Parliament as expressed in s 17A of the Interpretation Acts 1948 and 1967. Rule 76 of the Rules of the Court of Appeal 1994 (‘RCA’), when read with para 12 of the Schedule to the Act vested in the Court of Appeal the power to transfer any case to another court, which in the present context, must refer to the Federal Court (see pp 68C–F, 69A).

G (2) Order 92 r 4 of the Rules of the High Court 1980, which declared the inherent jurisdiction exercisable by the High Court had a jurisdictional effect and was of wide import; *The Motor Emporium v Arumugam* [1933] MLJ 276 followed. Such jurisdiction was equally exercisable by the Court of Appeal in consequence of r 76 of the RCA. The only postulate for the exercise of that jurisdiction was the interest of justice. So far as the present case was concerned, the interests of justice was clearly in favour of effecting a transfer (see p 69A–C, 69E).

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[Bahasa Malaysia summary]**A**

Responden dalam kes ini telah membuat satu bantahan atas alasan bahawa mahkamah ini tiada bidang kuasa untuk memindahkan rayuan perayu ke Mahkamah Persekutuan. Adalah diujahkan bahawa memandangkan Mahkamah Rayuan tiada bidang kuasa untuk mendengar rayuan, ia juga tidak mempunyai bidang kuasa untuk membuat perintah pemindahan tersebut.

B**Diputuskan:**

- (1) Di mana Mahkamah Rayuan tiada bidang kuasa untuk mendengar rayuan (*Batu Kawan Bhd v Pentadbir Tanah Daerah Seberang Perai Selatan* [1998] 3 MLJ 205), ia tidak bermakna bahawa ia tiada bidang kuasa untuk memindahkan kes ke Mahkamah Persekutuan. Frasa dalam perenggan 12 Jadual kepada Akta Mahkamah Kehakiman 1964 hendaklah dibaca secara luas dan mengikut tujuannya; *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 diikuti. Sememangnya, itu adalah niat Parlimen sebagai mana yang dinyatakan dalam s 17A Akta Tafsiran 1948 dan 1967. Kaedah 76 Kaedah-Kaedah Mahkamah Rayuan 1994 ('KMR'), apabila dibaca bersama perenggan 12 Jadual kepada Akta tersebut memberikan kuasa kepada Mahkamah Rayuan untuk memindahkan apa-apa kes ke mahkamah yang lain, di mana dalam konteks ini, hendaklah dirujuk ke Mahkamah Persekutuan (lihat ms 68C–F, 69A).
- (2) Aturan 92 k 4 Kaedah-Kaedah Mahkamah Tinggi 1980, yang mengisytiharkan bidang kuasa sedia ada yang digunakan oleh Mahkamah Tinggi mempunyai kesan bidang kuasa dan makna yang luas; *The Motor Emporium v Arumugam* [1933] MLJ 276 diikuti. Bidang kuasa sedemikian boleh juga digunakan oleh Mahkamah Rayuan mengikut k 76 KMR. Satu-satunya postulat untuk penggunaan bidang kuasa tersebut adalah demi kepentingan keadilan. Setakat mana kes ini adalah berkaitan, mahkamah berpendapat bahawa kepentingan keadilan jelasnya berpihak untuk pemindahan tersebut dilaksanakan (lihat ms 69A–C, 69E).].

C**D****E****F****G****Notes**

For cases on transfer of action, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 6382–6390.

H**Cases referred to**

Batu Kawan Bhd v Pentadbir Tanah Daerah Seberang Perai Selatan [1998] 3 MLJ 205 (refd)
Chief Kofi Forfie v Barima Kwabena Seifah [1958] All ER 289 (refd)
Motor Emporium, The v Arumugam [1933] MLJ 276 (folld)
Pepper (Inspector of Taxes) v Hart [1993] AC 593 (folld)

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A Legislation referred to

Civil Law Ordinance 1956

Civil Procedure Code (Cap 7) s 151

Courts of Judicature Act 1964 Sch para 12

Courts Ordinance 1948

B Interpretation Acts 1948 and 1967 s 17A

Rules of the Court of Appeal 1994 r 76

Rules of the High Court 1980 O 92 r 4

Azlan Sulaiman (Allen & Gledhill) for the appellant.

Iskandar Ali bin Dewa (Senior Federal Counsel, Johor State Legal Adviser) for the respondent.

C Gopal Sri Ram JCA (delivering oral judgment of the court): There are almost one hundred appeals before us this morning. They all pertain to an identical point. It is whether we have jurisdiction to transfer all these appeals to the Federal Court for hearing and disposal. The respondent in this present case has taken an objection on the ground that this court has no jurisdiction to transfer the appellant's appeal to the Federal Court. He says that this is because we have no jurisdiction to hear the appeal and so it follows that we have no jurisdiction to make the order of transfer.

D Although learned senior federal counsel for the respondent was unable to cite any authority in support of that proposition, we think that there is a stream, albeit a slender stream, of authority flowing in the opposite direction. In *Lee Lee Cheng v Seow Peng Kwang* [1960] MLJ 1, Thompson CJ, when dealing with the expressions 'jurisdiction' and 'power' appearing in the Courts Ordinance 1948 said:

E The Third Schedule, on the other hand, is headed 'Additional Powers of the courts' and except in Items 22 and 26, which only relates to the appellate jurisdiction of the High Court, the word 'jurisdiction' does not occur anywhere in it. Each item, on the other hand, apart from those mentioned, begins with the words 'A court may'.

F It is axiomatic that when different words are used in a statute they refer to different things and this is particularly so where the different words are, as here, used repeatedly. This leads to the view that in the Ordinance there is a distinction between the jurisdiction of a court and its powers, and this suggests that the word 'jurisdiction' is used to denote the types of subject matter which the court may deal with and in relation to which it may exercise its powers. It cannot exercise its powers in matters over which, by reason of their nature or by reason of extra territoriality, it has no jurisdiction. On the other hand, in dealing with matters over which it has jurisdiction, it cannot exceed its power.

G The same distinction between jurisdiction and powers is to be observed in s 46 which deals with criminal matters. The first subsection sets out by reference to the First Schedule to the Ordinance, which is of the same sort of structure as the Second Schedule, the original criminal jurisdiction of the court whereas it is the second subsection which gives it the power when exercising that jurisdiction to pass any sentence allowed by law.

H It is to be observed in passing that a similar distinction is to be found in the Judicature Act 1925 (and was to be found in the Act of 1873). Certain

sections (eg 18, 20 and 21) relate in terms to the jurisdiction of the High Court. Others (eg 39 and 46) provide that the court 'shall have power'.

The view that in the Ordinance jurisdiction is not synonymous with powers gains strength when the Ordinance is considered in the light of the 1948 Agreement.

Lee Lee Cheng was a case in which an attempt was made to extend the time limited for bringing an action in a running-down claim. Counsel for plaintiff relied on a paragraph in the Third Schedule to the courts ordinance which conferred jurisdiction on a court to extend or abridge time. It is in this context that the Court of Appeal of Malaya, affirming the judgment of Syed Sheh Barakbah J (as he then was), held that whilst there might be jurisdiction to extend time the particular statute, namely the Civil Law Ordinance 1956 did not confer upon the court the power to extend time.

In the present instance, the question is whether this court has jurisdiction to transfer a case which it has no jurisdiction to hear and dispose of. That we have no jurisdiction to hear the appeal is, at least for the moment, settled by the decision of the Federal Court in *Batu Kawan Bhd v Pentadbir Tanah Daerah Seberang Perai Selatan* [1998] 3 MLJ 205. Does that mean that we have no jurisdiction to transfer this case to the Federal Court which is the court vested with the necessary jurisdiction? We think not.

So far as written law is concerned it is sufficient for us to refer to three provisions. The first is p 12 of the Schedule to the Courts of Judicature Act 1964 ('the CJA') which confers on the High Court power to transfer proceedings from itself to another court. It reads as follows:

- 12 Power to transfer any proceedings to any other court or to or from any subordinate court, and in the case of transfer to or from a subordinate court to give any directions as to the further conduct thereof:

Provided that this power shall be exercised in such manner as may be prescribed by any rules of court.

In our judgment, the phrase 'any other court' must in the present context be read generously and purposively. See *Pepper (Inspector of Taxes) v Hart* [1993] AC 593, per Lord Griffith at p 617. Indeed that is the will of Parliament as expressed in s 17A of the Interpretation Acts 1948 and 1967. That section reads:

In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

The second provision that is relevant for present purposes is r 76 of the Rules of the Court of Appeal 1994 which reads as follows:

The court shall exercise, for all purposes incidental to or arising from any application or appeal, all the powers which, under the provisions of any written law in force in the place of trial at first instance, were vested in the trial judge, whether before, during or after the trial, to the extent that such powers may be applicable to the circumstances of an application or appeal to the court.

- A** This rule, when read with para 12 of the schedule to the CJA, vests in us the power to transfer any case to another court, which, in the present context, must refer to the Federal Court.

Finally, there is O 92 r 4 of the Rules of the High Court 1980, which declares the inherent jurisdiction exercisable by the High Court. It reads as follows:

- B** For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.
- C** That this rule of court has jurisdictional effect and is of wide import is settled by the judgment of Terrel Ag CJ in *The Motor Emporium v Arumugam* [1933] MLJ 276 at p 278. The learned acting Chief Justice, when dealing with s 151 of the Civil Procedure Code (Cap 7) of Malaya, the precursor to O 92 r 4 of the RHC said that the provision:
- D** ... has the widest possible *jurisdiction* in all suits, matters and questions of a civil nature, and although the legislature has given no indication on what principles such jurisdiction should be exercised, every court must have inherent jurisdiction to do justice between the parties, and apply such principles as are necessary or desirable for attaining such object, and for giving decisions which are in conformity with the requirements of the social conditions of the community where the law is administered.

- E** Such jurisdiction is equally exercisable by this court in consequence of r 76 to which reference has already been made. The only postulate for the exercise of that jurisdiction is the interests of justice. So far as the present instance is concerned, we think that the interests of justice lie clearly in favour of effecting a transfer. There is decision of the Federal Court that
- F** says that we lack jurisdiction to hear this appeal. It binds us. Consider then as to what will happen if we do not order a transfer. It would mean that the instant appellant would have to apply to the Federal Court for an extension of time to lodge an appeal to that court. Such extension may or may not be granted, as it is a matter of discretion. If time is granted, then a fresh notice and record of appeal will have to be lodged. The costs incurred by the
- G** appellant in bringing the appeal before us will be wasted. Now, multiply that several hundred times — there are several hundreds of these cases — and you will see at once where the justice of the case lies.

- So it comes to this. We have the requisite jurisdiction and the power to order a transfer. These are the two conditions set by *Lee Lee Cheng* and they
- H** are satisfied. So the transfer may be made.

- We may add we also derive support from the decision of the Privy Council in *Chief Kofi Forfie v Barima Kwabena Seifah* [1958] All ER 289. Although it is a case that is only noted, the judgment of the Board delivered by Mr LMD De Silva is particularly instructive. We would quote the following passage from the advice:
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Assuming that the judge had no power on 29 June 1949, to review his judgment of 10 May 1949, he nevertheless had power to declare nullity and

proceed to give a fresh judgment. This, in fact, he had done, and the only criticism of the proceedings of 29 June that could be made was that, on a question of procedure, he attributed the authority to do the thing he did to a source from which it did not flow. But, although the source named was, on the assumption made, incorrect, he undoubtedly had had power to do the thing he had done.

By analogy, if we have no jurisdiction to hear this appeal, we nevertheless have jurisdiction to transfer this appeal to a court which has jurisdiction to hear and dispose of it; in this instance the Federal Court.

For the reasons already given the objection as to jurisdiction fails. Nevertheless it would not be quite out of place to express our gratitude to Encik Iskandar Ali bin Dewa Senior Federal Counsel who has taken pains to raise the point in the interests of justice. But for his intervention, all these cases would have had to be dealt with *sub silentio* on the point of jurisdiction.

For convenience, this appeal and all the other 96 appeals will be dealt with by the order that we now propose to make.

Order accordingly.

Reported by Peter Ling

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